EXHIBIT 1
DATE 2-12-2009
HB HB 405

Montana
Association of REALTORS®
Political Affairs

One South Montana Avenue, Suite M1 · Helena, MT 59601
Phone: 406-443-4032 · Fax: 406-443-4220 · Toll Free: 800-477-1864
Email: mtmar@montanarealtors.org · Web: www.montanarealtors.org

Testimony of Montana Association of REALTORS® (MAR)
Glenn Oppel, Government Affairs Director
House Local Government Committee, Feb. 12, 2009, 3:00 p.m., Rm 172

House Bill 405 – Criteria for local subdivision review
Sponsor: Rep. Michele Reinhart

MAR Position: Oppose

In the Montana Subdivision and Platting Act, applicants already have to prove that hazards can be mitigated by specific methods or subdivision is prohibited. The requirement that the applicant provide substantial credible evidence demonstrating that the subdivision is designed to minimize potential impacts is in direct conflict with 76-3-608(4) and (5), which provide as follows:

> "(4) The governing body may require the subdivider to design the proposed subdivision to reasonably minimize potentially significant adverse impacts identified through the review required under subsection (3). The governing body shall issue written findings to justify the reasonable mitigation required under this subsection (4).
>
> (5) (a) In reviewing a proposed subdivision under subsection (3) and when requiring mitigation under subsection (4), a governing body may not unreasonably restrict a landowner's ability to develop land, but it is recognized that in some instances the unmitigated impacts of a proposed development may be unacceptable and will preclude approval of the subdivision.
>
> (b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider."

The plain meaning of (4) and (5) is that mitigation will be required by the governing body **in some cases** in order to obtain approval. Since the county is requiring the mitigation, the county is often in the position of telling the applicant, "this is the mitigation that is required based on the proven impacts of your subdivision." Under current law, if the subdivider has a preferred alternative, but adequate, method of mitigation, then the governing body must give that proposal due consideration. Conversely, HB 405 would make the applicant tell the county what kind of mitigation methods are appropriate and then prove that they are effective.

This is an odd amendment because a governing body does not under current law accept mitigation that it does not think is adequate and effective, yet current law does not make the applicant affirmatively prove that the mitigation is effective. Rather, the effectiveness of the mitigation is determined by the judgment of the planning department and governing body on the basis of the contents of the application and the public comments received. Thus, HB 405 creates a burden of proof where there was none, but does not ensure, any more than current law provides, that only effective mitigation will be accepted.

Also, as applied, this amendment is a huge departure from the current law because it will enable the county to play a guessing game with the applicant whereby the applicant will have to continuously try to prove that the mitigation offered is acceptable, and the local government may

continuously reject it. Current law permits mitigation to be a more collaborative, less adversarial process, and we should keep it that way.

Lastly, it is imperative to clarify that Senate Bill 305 establishes a standard of evidence common in other statutes. This change is absolutely necessary because often local governments impose mitigation requirements on subdividers with little or no evidence that mitigation is necessary or appropriate to address the impacts of the subdivision.

SB 305 does not shift an evidentiary burden from the applicant to the governing body. It clarifies the standard for the evidence which must form the basis of the governing bodies' decisions to approve or deny. Under current law, governing bodies must base their decisions on evidence, and when they fail to do so, they act arbitrarily and capriciously. SB 305 simply clarifies the standard to which that evidence must conform. Failure to conform to this new standard will still constitute an arbitrary and capricious decision.

In order to support a denial or an approval, SB 305 requires only that there be substantial credible evidence in the record. SB 305 does not operate to shift the burden, that was once on the applicant, to the governing body. In the real-world application of SB 305, the subdivider will submit an application which must contain substantial credible evidence that it complies with state and local law in order to be approved.

continuously reject it. Current law permits mitigation to be a more collaborative, less adversarial process, and we should keep it that way.

Lastly, it is imperative to clarify that Senate Bill 305 establishes a standard of evidence common in other statutes. This change is absolutely necessary because often local governments impose mitigation requirements on subdividers with little or no evidence that mitigation is necessary or appropriate to address the impacts of the subdivision.

SB 305 does not shift an evidentiary burden from the applicant to the governing body. It clarifies the standard for the evidence which must form the basis of the governing bodies' decisions to approve or deny. Under current law, governing bodies must base their decisions on evidence, and when they fail to do so, they act arbitrarily and capriciously. SB 305 simply clarifies the standard to which that evidence must conform. Failure to conform to this new standard will still constitute an arbitrary and capricious decision.

In order to support a denial or an approval, SB 305 requires only that there be substantial credible evidence in the record. SB 305 does not operate to shift the burden, that was once on the applicant, to the governing body. In the real-world application of SB 305, the subdivider will submit an application which must contain substantial credible evidence that it complies with state and local law in order to be approved.